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No. 00-129

IN THE
Supreme Court of the United States

LOCAL UNION 1011, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ALEXIS HERMAN, SECRETARY OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), this Court granted *certiorari* to settle the important Labor-Management Reporting and Disclosure Act § 401(e) question of the appropriate standard for determining the reasonableness of union meeting attendance candidacy requirements. The gist of our *certiorari* petition is that the *Local 3489* decision, rather than settling that question, has generated a three-way circuit conflict resulting from

(i) the First Circuit's holding in *Herman v. Springfield, Mass. Area Local 497, Postal Workers*, 201 F.3d 1, 5 (2000) ("*Postal Workers*"), that meeting attendance rules are to be judged by the multi-factor standard set out in the Secretary of Labor's 29 C.F.R. 452.38(a) regulations in force at the time of the *Local 3489* litigation;

(ii) the D.C. Circuit's holding in *Doyle v. Brock*, 821 F.2d 778, 785 (1987)—later adopted by the Secretary as a matter of judicial *force majeure*—that the "impact" of a meeting attendance requirement as measured by the "percentage who would be rendered ineligible by its application," is "by itself sufficient to make the requirement unreasonable *notwithstanding any . . . other factors*," 29 C.F.R. 452.38(a) n.25 (emphasis added); and

(iii) the Seventh Circuit's holding below that the reasonableness of meeting attendance rules is to be assessed by a three-factor test different from the Secretary's historic multi-factor test.

The gist of the Secretary's Brief in Opposition is that these evident discordances can somehow be harmonized through the understandings

(i) that the Seventh Circuit standard provides not for the three-factor inquiry that we outlined, but for a two-

step inquiry according to which (a) a meeting attendance rule that results in a high percentage of disqualified members may be justified by a convincing union showing that the rule is not burdensome; and (b) if the union's showing in that regard falls short, by a convincing union showing that the rule serves compelling union needs, Brief in Opp. 10;

(ii) that the D.C. Circuit *Doyle* standard does not, as we stated, provide that a meeting attendance requirement is invalid *per se* on a showing that a high percentage of a union's members failed to satisfy the requirement, but instead provides that such a showing creates a presumption of invalidity that, as the Secretary recognizes, can *not* be overcome by a union showing that the rule is not burdensome, but, according to the Secretary, *can* be overcome by a union showing that the requirement serves a compelling need, Brief in Opp. 15 & n.7; and

(iii) that, while the First Circuit standard is, as we stated, the Secretary's historic multi-factor 29 C.F.R. 452.38(a) standard, that is of no moment here, because the First Circuit decision so stating came out of a case involving a less demanding meeting attendance requirement than the Steelworkers' requirement at issue here, Brief in Opp. 12-13.

Even though it is the point on which the Secretary is most competent to speak, the Secretary *never* addresses the disharmonies between the court of appeals' meeting-attendance-rule standards and the standard of the Secretary's present enforcement policy, *viz.*, the standard providing that, where a high percentage of the union's members do not satisfy a particular meeting attendance requirement, that factor is "by itself sufficient to make the requirement

unreasonable notwithstanding any . . . other factors." 29 C.F.R. 452.38(a) n.25; *see also* 60 Fed. Reg. 26391 (May 17, 1995) (announcing that the Labor Department will take "enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy"). This silence is particularly telling in that the Secretary's standard is not only different from the standard that the Brief in Opposition ascribes to *any* of the court of appeals decisions, it is a standard that the First and the Seventh Circuits have rejected in no uncertain terms as contrary to law.

In this Reply, we show that the Secretary's attempt to create harmony out of discord does not succeed. While the Secretary's reading of the Seventh Circuit's decision is a defensible—albeit not the most apparent—reading of the decision below, that does not alter our basic point that on either the Secretary's reading or ours, the Seventh Circuit's standard is different from the D.C. Circuit standard, different from the First Circuit standard, and different from the Secretary's enforcement standard—and in an outcome determinative way. In the course of that showing, we demonstrate (i) that the reading of the D.C. Circuit *Doyle* decision proffered by the Secretary in her Brief in Opposition is not only contrary to the Secretary's consistent reading of that decision from its issuance until the filing of her brief here, but implausible on its own terms; and (ii) that the Steelworkers' meeting attendance rule is reasonable and valid under the First Circuit/pre-*Doyle* multi-factor standard, as the Secretary should be the first to acknowledge.

Before turning to those particulars, we would emphasize this salient point: giving the Brief in Opposition all that it asks for and more than it is due, that brief does not in fact rationalize the court of appeals law or bring that law into line with the Secretary's enforcement policy. The truth of the matter is that the LMRDA meeting-attendance-rule legal

regime created by *Doyle*, *Postal Workers*, the decision below, and the Secretary's enforcement policy is one that is utterly irrational and arbitrary. Under the present regime, the Secretary sues to overturn any election run under a meeting attendance rule that does not satisfy a pure *post hoc* "percentage impact" test in order to avoid being sued by a complaining union member in the D.C. Circuit on the basis of the *Doyle* decision. *See* Pet. 6-7, 18-19 (showing that Secretary offered no reason other than the fear of being sued in the D.C. Circuit for her enforcement policy). Yet the Secretary's enforcement policy standard has now been rejected by the First Circuit and the Seventh Circuit. And, to bring us to the surreal, the Secretary, in the face of her longstanding enforcement-policy reading of *Doyle*, now offers up a different, revisionist reading of *Doyle* that destroys the policy's stated legal base.

Plainly, this is not the coherent legal regime that the *Local 3489* decision was intended to create. And, only a second decision by this Court giving an authoritative gloss on *Local 3489* can create such a regime.

1. As we have said, the Secretary reads the Seventh Circuit's decision below as adopting a two-step test for judging the legality of meeting attendance requirements, Br. in Opp. 10, rather than the three-factor test we outlined at Pet. 10-11. We would note in this regard that the Secretary's tendentious reading of that decision depends on dismissing more than half of the Seventh Circuit's analysis (including a full page on the import of "excuse" provisions) as a series of irrelevancies.

But we do not belabor this point here, for what is essential at this jurisdictional stage is that, on the Secretary's reading of the decision below, as on ours, the Seventh Circuit's position on the proper interpretation of § 401(e) and *Local 3489* conflicts with the positions of the D.C. Circuit in *Doyle* and the First Circuit in *Postal Workers*.

a. The Seventh Circuit's approach is not the *Doyle* approach or the approach of the Secretary's enforcement policy as stated in the *Doyle* footnote to 29 C.F.R. 452.38(a). The Seventh Circuit bluntly called the *Doyle* footnote "wrong." Pet. App. 5a. And the Secretary, though at one point appearing to suggest that the decision below can be harmonized with *Doyle* (Brief in Opp. 14-15), ultimately concedes that under the Seventh Circuit's analysis—but *not* under the D.C. Circuit's *Doyle* analysis—a meeting attendance rule which has a high "percentage impact" can be defended on the basis that it is "not burdensome." Brief in Opp. 15 n.7.

Despite that concession, the Secretary attempts to obscure the differences between *Doyle* and the decision below by stating that *Doyle* did not adopt an "inflexible rule that a meeting-attendance requirement that excludes a high percentage of union members from candidacy is always invalid." Brief in Opp. 14. As we have stressed, the Secretrary herself—both in her published statement in the Federal Register setting forth the Labor Department's enforcement policy and in the language of the operative footnote amendment to her regulation—characterizes *Doyle* as adopting precisely such an inflexible rule. Indeed, the footnote amendment to her regulations states that *Doyle* "held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was *by itself* sufficient to make the requirement unreasonable *notwithstanding any of the other factors set forth in 29 C.F.R. 452.38(a).*" 29 C.F.R. 452.38(a) n.25 (emphasis added).[1]

[1] An April 1994 letter from the Labor Department to the Steelworkers—adverted to by the Secretary (Brief in Opp. at 17 n. 8)—serves to reinforce the point that the Labor Department's interpretation of *Doyle* has always been the one reflected in the footnote amendment to 29 C.F.R. 452.38(a). The 1994 letter stated that *Doyle*, by "emphasiz[ing] the importance of impact alone in determining the

And, for better or worse, the foregoing reading of *Doyle*—and not the Secretary's Brief-in-Opposition reading of *Doyle*—is the accurate one.[2]

In all events, as we noted in discussing the Secretary's treatment of the Seventh Circuit's decision below, the Secretary concedes that *Doyle*—even when given the more "flexible" reading that she now proffers—*still* cannot be reconciled with the Seventh Circuit's decision, in that the latter decision holds that a meeting attendance rule which does not pass the "percentage impact" test "may be justified by showing ... that [the rule] is not burdensome," whereas *Doyle* does not permit such a justification. Brief in Opp. at 15 n.7.

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reasonableness of a meeting attendance requirement," had created "a conflict [with] policies and decisions previously adopted by our agency," and had made it "questionable" whether the agency could successfully "sustain the denial of a challenge to a meeting attendance rule based solely on impact." 1994 Letter, pp. 1-2. The 1994 letter went on to inform the Union that the Department, in the wake of *Doyle*, could no longer adhere to its 1978 position that the Steelworkers' rule "would not be subject to challenge solely on the basis of its impact (i.e., the percentage of the membership which failed to qualify under it)." *Id.* at 1.

[2] *Doyle* says in clear terms: "There is *no* basis, in *Steelworkers [Local 3489]* or in any other case, for the notion that an attendance requirement that has a large antidemocratic effect [as measured by the percentage of members who do not satisfy the requirement] can be reasonable on its face, and that some additional factor is necessary to find the requirement violative of the LMRDA." 821 F.2d at 785 (emphasis in original). And, though *Doyle* states generically that, under the LMRDA, union office eligibility requirements which a high percentage of members do not satisfy can be defended if they serve "valid union interests," *id.*, the decision goes on to add that in the specific case of *meeting attendance* eligibility requirements, there is *no* such defense available, because, as the court saw it, none of the interests advanced by the Secretary in *Doyle* (or by unions in other cases) in support of meeting attendance requirements are sufficiently vital to justify such requirements where a high percentage of members do not attend the requisite number of meetings, *id.* at 785-86.

Indeed, the Secretary, in a testament to her failure to square *Doyle* with the decision below or with the First Circuit's *Postal Workers* decision, holds out the prospect that the D.C. Circuit one day "could resolve th[e] [percentage impact] question differently" than that court did in *Doyle*, Brief in Opp. at 15 n.7—and in so doing retreat from the improper standard stated in *Doyle*, free the Secretary from her irrational enforcement policy, and bring reason and uniformity to the meeting-attendance-rule law. While we would most heartily agree that a new and different D.C. Circuit meeting-attendance-requirement standard would be welcome, there is no sign that any such D.C. Circuit action is forthcoming.

b. The Seventh Circuit's standard differs not only from the *Doyle* standard and the Secretary's enforcement-policy standard, but also from the Secretary's *pre*-Doyle/29 C.F.R. 452.38(a) standard which the First Circuit followed in *Postal Workers*, 201 F.3d at 5 (stating that the court "share[s]" the view of the § 401(e) case law that the Secretary had championed in *Doyle* and that the D.C. Circuit rejected).

That aspect of this three-way conflict is of particular moment here, for the Secretary reviewed under her original standard the Steelworkers' meeting attendance requirement at issue here—which was adopted after the *Local 3489* decision to bring the requirement into conformity with LMRDA § 401(e) as interpreted by this Court in that decision—and she determined that it "would be regarded as *reasonable within the [29 C.F.R. 452.38(a)] guidelines*, even if its application resulted in the disqualification of a high proportion of the membership." 1978 Letter at 1 (emphasis added). *See also* Pet. 5. In making that determination, the Secretary, of course, knew from the face of the Steelworkers' requirement that attendance had to begin eight months prior to an election, and the Secretary, *unlike the Seventh Circuit*, found the eight-

month period to be one that does *not* impose an unreasonable "burden" on candidacies. *See* 1978 Letter at 1, 2.[3]

Against all this, the Secretary suggests that the First Circuit might well invalidate the Steelworkers' rule, and that the court's *Postal Workers* decision is not a sufficient indication to the contrary since the *Postal Workers* meeting attendance requirement could be met by attendance at the meetings within four months of the election, rather than eight months as provided for by the Steelworkers' requirement. Brief in Opp. 12-13. But the First Circuit made a point of emphasizing in *Postal Workers* that this Court's *Local 3489 Steelworkers* decision "approved the Secretary's own flexible, multi-factor test for reasonableness." 201 F.3d at 5. And, that being so, it is bootless for the Secretary to contend that, even though she applied that test to the very rule at issue here and determined that the rule is reasonable, the First Circuit nevertheless would reject her application of her own test and substitute a contrary judicial application in its stead.

2. After attempting to harmonize the court of appeals case law, the Secretary falls back on the contention that this case is not a suitable vehicle to resolve the conflict that obtains and

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[3] The Secretary attempts to denigrate the significance of her earlier review and approval of the Steelworkers' rule by asserting that "the Department [of Labor] informed the International in April 1994, well before the election in this case, that the Department no longer adhered to the opinion in the 1978 letter." Brief in Opp. 17 n.8. But, as explained in note 1 *supra*, in the April 1994 letter, the Labor Department did *not* state that it had retracted its opinion concerning the proper application of the Department's historic multi-factor test, much less that it had reconsidered whether requiring attendance at eight monthly meetings is unduly "burdensome." Rather, as that letter states, the Department felt it necessary, solely as a result of *Doyle*, to withdraw the assurances it had given in the 1978 letter ruling to the effect that the Steelworkers' rule would not be subject to challenge on the basis of the percentage of the membership which failed to satisfy the requirement. *See* note 1 *supra*.

that this case is therefore not cert-worthy. Brief in Opp. 15-16. The Secretary's contention in this regard is as feckless as the Secretary's contention that the court of appeals' meeting-attendance-requirement law is consistent and coherent.

The D.C. Circuit and the Seventh Circuit read *Local 3489* as a decision that, at once, *confirms* that the Secretary was correct in her contention that the eighteen-month meeting attendance requirement at issue there fails the Secretary's 29 C.F.R. 452.38(a) standard of legality; and, at the same time, *rejects* the 29 C.F.R. 452.38(a) standard itself, authorizing the courts of appeal to substitute a different and more stringent standard—a standard which invalidates rules that would pass muster as "reasonable" under the Secretary's traditional enforcement policy. Our submission, in contrast, is that *Local 3489*—in sustaining the Secretary's effort to effectuate her traditional enforcement policy, and in quoting with approval the regulation setting out the 29 C.F.R. 452.38(a) standard—was not intended to work a change in the law and cannot properly be read to have done so.

Because the Labor Department has applied the original 29 C.F.R. 452.38(a) standard to the Steelworker requirement at issue in this case and the agency has made a determination that the rule is reasonable and valid under that standard, this case is not only an appropriate, but in many ways an ideal, vehicle for resolving the conflict over the meaning of *Local 3489*. For that agency determination (a) makes it plain that the resolution of the dispute just outlined over the meaning of that decision is outcome-determinative, and (b) spares this Court the need to venture a *de novo* judicial determination of the requirement's reasonableness. If the conflict is resolved by reading *Local 3489* to *endorse* the enforcement policy reflected in the original 29 C.F.R. 452.38(a) standard, the Union will necessarily *prevail* on the strength of the Secretary's own application of that standard; and, if the conflict is resolved in favor of either the D.C. Circuit or

Seventh Circuit reading of *Local 3489*, the Union will *not* prevail. This case is thus cert-worthy in every respect.

CONCLUSION

For the foregoing reasons and those stated in the *certiorari* petition, the petition should be granted.

Respectfully submitted,

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